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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

8 * * *

9 UNITED STATES OF AMERICA,)

10 Plaintiff,)

11 vs.)

12)
13 ELIJAH WILLIE AKPAN,)

14 Defendant.)

2:05-cr-00304 RCJ-RJJ

REPORT & RECOMMENDATION
OF UNITED STATES
MAGISTRATE JUDGE

(Defendant's Motion to Suppress (#68))

15 This matter is before the Court on Defendant, Elijah Willie Akpan's Motion to Suppress
16 Evidence (#68). The Court has considered Defendant's Motion (#68), the Government's Response
17 (#82), Defendant's Reply (#89), and the Government's Supplement to the Motion to Suppress
18 Evidence (#109), in addition to the evidence and arguments presented at the evidentiary hearing.

19 **BACKGROUND**

20 In August 2003, the Health and Human Services-Office of Inspector General and the State
21 of Nevada Attorney General's Office commenced an investigation on Elijah Willie Akpan and two
22 of his businesses: Tropicana Medical Supply (TMS); and Durable Medical Equipment (DME). The
23 Government believed Akpan was defrauding Medicare and Medicaid, in violation of Title 18, United
24 States Code, Section 1347. In the late months of 2003, and the early months of 2004, Government
25 investigators interviewed several former TMS employees. From the interviews, the Government
26 determined that it was highly probable that Akpan was defrauding Medicare and Medicaid.

27 During the investigation, the Government conducted several statistically valid random
28 samples of TMS's customer base to determine the extent of the alleged fraud. The samples were

1 generated from Medicare and/or Medicaid beneficiaries whose accounts were: (1) billed by TMS
2 between January 1, 2000, and September 1, 2003; and (2) billed for at least one of the following:
3 wheelchairs and accessories; enteral nutrition; ostomy supplies; or incontinence supplies. The
4 sampling produced a total of one-hundred and one (101) Medicare and Medicaid beneficiaries
5 allegedly defrauded.

6 The Government continued its investigation until it submitted an application for a search
7 warrant, at the end of 2004, to search Akpan's residence and several of TMS's and DME's business
8 locations. The search warrant application consisted of the search warrant, a sworn affidavit, and
9 three attachments A, B, and C. Attachment A of the search warrant listed six locations to be
10 searched, Attachment B listed items to be seized, and Attachment C listed the names of the allegedly
11 defrauded Medicare/Medicaid beneficiaries. The attached Affidavit established probable cause to
12 issue the warrant.

13 On January 5, 2005, a federal magistrate judge granted the search warrant for the following
14 six locations: (1) 5020 East Tropicana Avenue, Suite 5B, Las Vegas, Nevada; (2) 8536 Del Webb
15 Boulevard, Las Vegas, Nevada; (3) 2797 S. Maryland Parkway, Suite 12-A, Las Vegas, Nevada; (4)
16 4888 E. Tropicana Avenue, Unit 1017, Las Vegas, Nevada; (5) 4888 E. Tropicana Avenue, Unit
17 1018, Las Vegas, Nevada; and (6) 7431 Bachelors Button Drive, Las Vegas, Nevada. The
18 Government simultaneously executed the searches on all of these locations on January 5, 2005.

19 In July 2005, a grand jury issued a criminal indictment charging Akpan with twelve counts
20 of health care fraud in violation of 18 U.S.C. § 1347. Indictment (#1). On May 10, 2006, the
21 Government filed a Superseding Indictment (#25), charging Akpan with 129 counts of health care
22 fraud in violation of 18 U.S.C. § 1347; and one criminal forfeiture allegation pursuant to 18 U.S.C.
23 § 982(a)(7) and (b)(1).

24 Akpan now files a Motion to Suppress (#68) the evidence collected from the six locations
25 in the search warrant, and statements made by Akpan. He argues that the statements and evidence
26 obtained from the searches conducted on January 5, 2005, should be suppressed because: (1) the
27 search warrant lacked particularity; (2) the execution of the search warrant by the Government was
28 conducted in an unconstitutional manner; and (3) Akpan was subjected to an unconstitutional

1 interrogation. The Court heard testimony from both the Government and the Defense during a three
2 day evidentiary hearing. The Court now determines Akpan's Motion to Suppress (#68).

3 **FACTS**

4 **I. Search of Defendant's Residence**

5 On January 5, 2005, Federal Agents executed a federal search warrant on Akpan's residence
6 located at 7431 Bachelors Button Drive, Las Vegas, Nevada 89131. The agents arrived at the
7 residence at approximately 12:05 p.m. Upon arriving at the door, the agents knocked and announced
8 their presence indicating that they were executing a federal search warrant on the residence. Akpan
9 and some of his family were inside the residence. Akpan opened the door and the agents explained
10 to that he was not under arrest, but that they were there to execute a search warrant on the residence.
11 The search warrant and attachments were immediately presented to Akpan. The agents entered the
12 residence, with no guns drawn, to preform a protective sweep of the residence. An agent informed
13 Akpan that no calls could be made or received during the protective sweep. Once the protective
14 sweep was completed and the residence was secured, phone calls would be allowed. The no call rule
15 was given to protect the agents located at the other five locations that were being simultaneously
16 searched.

17 Once the house was secured, the agents informed Akpan and his family that they could leave
18 at any time and were not required to stay at the residence; however, if they decided to leave they
19 would not be allowed to re-enter the residence until after the search was completed. If Akpan and
20 his family remained in the home, his family would have to remain in a central location for the
21 protection and safety of the agents. Akpan told the agents that he and his family were going to stay
22 and Akpan asked his family to move to a family room in the basement.

23 Once the protective sweep was completed and prior to searching the residence, an agent took
24 photographic images and made a videotaped recording the condition of the residence prior to the
25 search. The agents then began searching the residence. During the search, agents set up electronic
26 devices in the kitchen of the residence to copy computer hard drives located in the residence.
27 Akpan's family was allowed to get food and water from the kitchen; however, the family was not
28 allowed to use the microwave to heat food due to the fact that using the microwave could interrupt

1 the imaging of the computers.

2 The agents asked Akpan if they could interview him. Prior to the interview, an agent
3 informed Akpan that he was not under arrest, that the interview was voluntary, and he could leave
4 at any time. Akpan asked the agents whether he needed his attorney, specifically asking, "Do I need
5 my attorney?" The agents responded that they could not give him advice as to whether he needed
6 his attorney. Akpan responded by stating he had nothing to hide and agreed to speak with the
7 interviewing agents without an attorney. Akpan was interviewed twice and no Miranda warnings
8 were given.

9 Akpan's first interview began at approximately 12:30 p.m. During this interview, Akpan
10 was asked about his educational background and work experience. The agents asked Akpan about
11 his TMS business, including: employees; supervising employee's duties; general order filling
12 procedures; and medicare billing procedures. Questions were also asked about his finances,
13 including: annual salary; assets owned; checking accounts; and other business ventures. The first
14 interview ended at approximately 3:00 p.m., and Akpan was allowed to join his family in the
15 basement of his residence.

16 Akpan's second interview began at approximately 3:50 p.m. Akpan was once again told that
17 the interview was voluntary and that he could leave at any time. During the second interview, Akpan
18 was asked about specific fraudulent Medicaid and Medicare billing incidents. During this
19 interview, Akpan made incriminating statements. The second interview ended at approximately 5:00
20 p.m.

21 At the conclusion of the search, exit photographs and a videotape recording were taken to
22 show the condition of the residence. Akpan, along with an agent, conducted a final walk through of
23 the residence. A receipt of the property seized from the residence was given to Akpan and at
24 approximately 6:45 p.m. the agents exited the residence and left the premises.

25 **II. Search of Defendant's Business Locations**

26 On January 5, 2005, agents also executed a federal search warrant on three of Akpan's
27 business locations and two storage units. The three business locations, and two storage units are:
28 (1) 5020 East Tropicana Avenue, Suite 5B, Las Vegas, Nevada; (2) 8536 Del Webb Boulevard,

1 Las Vegas, Nevada; (3) 2797 S. Maryland Parkway, Suite 12-A, Las Vegas, Nevada; (4) 4888 E.
2 Tropicana Avenue, Unit 1017, Las Vegas, Nevada; and (5) 4888 E. Tropicana Avenue, Unit
3 1018, Las Vegas, Nevada. The searches of these five locations were conducted simultaneously
4 with the search of Akpan's residence.

5 At all of the five locations, the agents knocked and announced their presence. The search
6 warrant was presented to the employees at the business locations; however, nobody was present
7 at the storage units for the agents to present the warrant. A protective sweep of each location was
8 conducted and the employees of the three business locations were allowed to stay in the office if
9 an emergency arose; otherwise, the employees were asked to wait outside. The searches of the
10 five locations each lasted approximately one to two hours. After the searches were completed,
11 the search warrant and inventory list of the items seized were left at the three business locations.
12 Due to the fact that no person was present at the storage units, agents gave the inventory of items
13 seized from the storage units to an employee at one of the other business locations.

14 DISCUSSION

15 I. Search Warrant

16 General warrants that allow "a general, exploratory rummaging in a person's belongings"
17 are prohibited by the Fourth Amendment. Coolidge v. New Hampshire, 403 U.S. 443, 467
18 (1971); see also United States v. Rude, 88 F.3d 1538, 1551 (9th Cir. 1996). Search warrants
19 must contain sufficient particularity that are "reasonably specific, rather than elaborately
20 detailed" to give meaningful guidance to the searching officers. Rude, 88 F.3d at 1551. A
21 warrant "must be specific enough to enable the person conducting the search [to] reasonably . . .
22 identify the things authorized to be seized;" otherwise the warrant will be viewed as an
23 unconstitutional general warrant. United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986). A
24 general warrant violates the particularity requirement of the Fourth Amendment because it gives
25 the executing officers unbridled discretion of conducting an exploratory rummaging through a
26 defendants belongings in hopes of finding some criminal evidence. Coolidge, 403 U.S. at 467.
27 The Ninth Circuit has stated:
28

1 In determining whether a description is sufficiently precise, we
2 have concentrated on one or more of the following: (1) whether
3 probable cause exists to seize all items of a particular type
4 described in the warrant; . . . (2) whether the warrant sets out
5 objective standards by which executing officers can differentiate
6 items subject to seizure from those which are not; . . . and (3)
7 whether the government was able to describe the items more
8 particularly in light of the information available to it at the time the
9 warrant was issued.

10 Spilotro, 800 F.2d at 963.

11 In the present matter, Akpan argues that the search warrant for his residence and business
12 locations is an unconstitutional “general warrant” because no date restrictions for the records to
13 be seized existed on the face of the warrant, affidavit or attachments. Under the first prong of
14 Spilotro, probable cause must exist to seize all items of a particular type described in the warrant.
15 800 F.2d at 963. If the warrant directs officers to seize every document on the premises, without
16 limitations, including documents unrelated to the specific criminal activity, then the warrant will
17 be viewed as unconstitutional. United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995).

18 Here, Attachment C to the search warrant limited the patient/client files and records to
19 one-hundred and three (103) individuals. Moreover, approximately twenty-one types of
20 documents were to be seized and a date restriction was set for “[p]ersonnel files of all persons
21 employed . . . for the years 2000 to present.” Government’s Response (#82) Attachment 1 at 43.
22 In Kow, the search warrant allowed the seizure of everything; however, here, only documents for
23 103 specific patients were being sought. 58 F.3d at 427. The warrant limited the documents to
24 the seizure of 103 patient/client files and records specifically related to the alleged Medicare and
25 Medicaid fraud. The agents did not seize all of Akpan’s patient records, only the 103 patients
26 listed in Attachment C to the warrant, and probable cause existed that Akpan allegedly used
27 these patients to defraud Medicare and Medicaid. The Court finds that probable cause existed to
28 seize all of the 103 patient/client files and records described in the warrant and pertinent
attachments.

Under the second prong of Spilotro, an analysis of the breadth of the warrant must be
performed to determine “whether the warrant sets out objective standards by which executing

officers can differentiate items subject to seizure from those which are not.” 800 F.2d at 963.

The Ninth Circuit has held that “[a] generalized seizure of business documents may be justified if the government establishes probable cause to believe that the entire business is merely a scheme to defraud or that all of the business’s records are likely to evidence criminal activity.”

Moreover, other circuits have found that “if the fraud operation under investigation was ongoing, evidence of illegal activity in the past would be relevant to the conspiracy, while records of legitimate transactions prior to the conspiracy will help determine how and when the fraud scheme began.” See United States v. Zanche, 541 F. Supp. 207 (D.N.Y. 1982); United States v. Slocum, 708 F.2d 587, 603 (11th Cir. 1983); United States v. Soussi, 29 F.3d 565, 569 (10th Cir. 1994). To that end, it may be necessary to obtain documents prior to the scheme because a complex scheme can be proved only “by piecing together many bits of evidence [similar to] a jigsaw puzzle, [and] the whole picture of . . . [the] scheme . . . could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little.” Andresen v. Md., 427 U.S. 463, 482 (1976) (internal quotations omitted).

In the present matter, Akpan argues that because the warrant, affidavit or attachments contained no date restrictions the Government could seize up to ten years worth of documents, which is unconstitutional. The Court disagrees. The Government did not seize all of Akpan’s business documents. Probable cause did not exist to establish that Akpan’s entire business was merely a scheme to defraud or that all of the business’s records would show criminal activity; however, the Government did establish probable cause to show that all of the business’s records related to the 103 patients listed in Attachment C would likely evidence criminal activity. Even though no date restrictions existed for the 103 patient/client files and records; the Court finds that the records seized were necessary for the Government to create its case. Similar to a jigsaw puzzle, the documents seized by the Government help determine how and when the alleged fraud scheme began.

After the suppression hearing, the Court was given, in camera, a detailed schedule of items seized by the Government in the Government’s Supplement to the Motion to Suppress Evidence (#109). After reviewing this schedule, the Court found that only 55 documents out of

1 8167 documents seized were before 2000. The majority of documents that predated 2000 were
2 Akpan's Medicare re-enrollment applications. The Court also found that only patient documents
3 for the names listed in Attachment C were in the Government's possession. Although the dates
4 for these patient documents range from 1999 to the present, the documents are necessary for the
5 Government's case and within the scope of the warranted language.

6 Lastly, the warrant along with the affidavit and attachments were present for review
7 during the search, and any agent with questions could have referenced the documents or asked
8 the supervising agent questions. If there was any doubt as to the breadth of the warrant, the
9 supervising agents were present to help the seizing agents determine what could be taken. The
10 Court finds that the warrant along with the affidavit and attachments set out objective standards
11 by which the agents could differentiate the items subject to seizure from those which were not.

12 Under the third prong outlined in Spilotro, the Court must determine "whether the
13 Government was able to describe the items more particularly in light of the information available
14 to it at the time the warrant was issued." 800 F.2d at 963. In the present matter, random samples
15 were generated by the Government to determine the extent of the alleged fraud scheme. From
16 the samples, approximately 101 allegedly defrauded beneficiaries of TMS were identified. This
17 amount is less than 5% of TMS's active customer base. Later, when the warrant was issued, the
18 Government described documents for 103 patients, still less than 5% of the active customer base.
19 Under these circumstances, the Court finds that the Government was not able describe the items
20 more particularly in light of the information available to the Government at the time the warrant
21 was issued.

22 When determining whether a search warrant is unconstitutional, a careful balance must be
23 struck between the need for documents in business record seizure situations and the need for
24 particularity. Based on the totality of the circumstances, the Court finds that the search warrant
25 along with the affidavit and attachments were sufficiently particular and constitutional and did
26 not amount to a general unconstitutional search warrant.

27 **II. Reasonableness of the Searches**

28 In order to challenge the reasonableness of a search, a defendant must establish standing.

1 Once standing is established, it becomes the defendant's burden to show that under the totality of
2 the circumstances, his legitimate expectation of privacy was violated. United States v. Parks,
3 285 F.3d 1133, 1141 (9th Cir. 2002). The defendant must show that a "subjective expectation of
4 privacy in the area searched" existed; and the expectation of privacy must be "one that society
5 would recognize as objectively reasonable." Id. at 1141. The Fourth Amendment allows the
6 issuance of a search warrant if probable cause exists; however, the Ninth Circuit holds that even
7 if a warrant is supported by probable cause, a search or seizure may be invalidated if the
8 execution of the warrant is conducted in an unreasonable fashion. U.S. CONST. amend IV; see
9 Franklin v. Foxworth, 31 F.3d 873, 875 (9th Cir. 1994). In determining whether a search is
10 unreasonable, an objective test is used based on the facts and circumstances confronting the
11 officers conducting the search. Franklin, 31 F.3d at 875. Typically, if excessive police force is
12 used when executing a search warrant, the search will be seen as unconstitutional; however, this
13 is not the only factor that must be considered. Franklin, 31 F.3d at 875. A court must look at the
14 reasonableness in each specific case and must consider "whether the totality of the circumstances
15 justifies a particular sort of [search] or seizure." Franklin, 31 F.3d at 875.

16 **A. Residence**

17 In the present matter, Akpan has standing to challenge the reasonableness of the search
18 conducted on his residence. The Government established probable cause by showing that Akpan
19 billed Medicaid and Medicare for all of his TMS's clients from his residence located at 7431
20 Bachelors Button Drive, Las Vegas, Nevada. When the agents arrived at the residence, the
21 agents knocked and announced their presence. A protective sweep was conducted on the
22 residence for officer safety but once the protective sweep was completed the agents informed
23 Akpan and his family that they were free to leave. Akpan and his family decided to stay. The
24 agents did not ask Akpan's family to stay but once they decided to stay, they were informed that
25 they would have to remain in one central location of Akpan's choosing. Akpan decided that he
26 and his family were going to stay in the family room downstairs. The family room is furnished
27 and a bathroom is located close by. Testimony at the hearing established that the agents tried to
28 make it as comfortable as possible for Akpan and his family during the search.

1 Akpan argues that the search and seizure of Akpan's property should be invalidated
2 because the agents searched all the rooms in the house, the children's computer, the refrigerator,
3 and the garbage. The evidence presented at the hearing showed that Akpan knew or was aware
4 that the Government was investigating his businesses. Moreover, all of the billing for Akpan's
5 businesses were conducted from his residence. Based on the totality of the circumstances, the
6 Court finds that the agents search of all the rooms in the house, the children's computer, the
7 refrigerator, and the garbage was reasonable.. Akpan may have been trying to hide his alleged
8 fraudulent scheme. Lastly, the warrant, along with the affidavit and attachments was presented to
9 Akpan at the outset of the search. There is no evidence to indicate that the search conducted on
10 Akpan's residence was executed in an unreasonable fashion. Therefore, the Court finds that the
11 execution of the search warrant on Akpan's residence was conducted in a reasonable manner.

12 **B. Business Locations and Storage Units**

13 The Supreme Court has found that businesses are protected by the Fourth Amendment
14 from unreasonable intrusions of business property by agents of the Government, but to a lesser
15 degree than homes. Donovan v. Dewey, 452 U.S. 594, 599 (1980). It is the defendant's burden
16 to establish that business locations or storage unit searches violated any Fourth Amendment
17 rights.

18 Probable cause existed to search Akpan's business locations and storage units. Moreover,
19 Akpan has failed to show that any expectation of privacy was violated when the Government
20 searched the following five locations: (1) 5020 East Tropicana Avenue, Suite 5B, Las Vegas,
21 Nevada; (2) 8536 Del Webb Boulevard, Las Vegas, Nevada; (3) 2797 S. Maryland Parkway,
22 Suite 12-A, Las Vegas, Nevada; (4) 4888 E. Tropicana Avenue, Unit 1017, Las Vegas, Nevada;
23 and (5) 4888 E. Tropicana Avenue, Unit 1018, Las Vegas, Nevada. Based on the testimony
24 presented at the hearing, the Court finds that the searches conducted on Akpan's business
25 locations and storage units were reasonably executed and constitutionally valid.

26 **III. Incriminating Statements**

27 The Fifth Amendment provides, in pertinent part, that "[n]o person . . . shall be
28 compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. It has

1 long been established that “when an individual is taken into custody or otherwise deprived of his
 2 freedom by the authorities in any significant way and is subjected to questioning, the privilege
 3 against self-incrimination is jeopardized.” Miranda v. Arizona, 384 U.S. 436, 478 (1966). The
 4 Supreme Court has noted that “without proper safeguards the process of in-custody interrogation
 5 of persons suspected or accused of crime contains inherently compelling pressures which work to
 6 undermine the individual’s will to resist and to compel him to speak where he would not
 7 otherwise do so freely.” Arizona v. Mauro, 481 U.S. 520, 525 (U.S. 1987). In order to prevent
 8 this, the Supreme Court held in Miranda “that a person questioned by law enforcement officers
 9 after being ‘taken into custody or otherwise deprived of his freedom of action in any significant
 10 way’ must first ‘be warned that he has a right to remain silent, that any statement he does make
 11 may be used as evidence against him, and that he has a right to the presence of an attorney, either
 12 retained or appointed.’” Stansbury v. California, 511 U.S. 318, 322 (U.S. 1994). Miranda
 13 warnings must be given before any custodial interrogation. United States v. Kim, 292 F.3d 969,
 14 973 (9th Cir. 2002). If a violation of a person’s Miranda rights occurs, any statements made by a
 15 suspect should be excluded from trial. Dickerson v. United States, 530 U.S. 428, 441-42 (2000).

16 In Miranda, the Supreme Court stated: “[b]y custodial interrogation, we mean questioning
 17 initiated by law enforcement officers after a person has been taken into custody or deprived of his
 18 freedom of action in any significant way.” Miranda v. Arizona, 384 U.S. 436, 444 (1966). When
 19 determining whether a suspect is in custody, “a court must examine all of the circumstances
 20 surrounding the interrogation but the ultimate inquiry is simply whether there [was] a formal
 21 arrest or restraint on freedom of movement of the degree associated with a formal arrest.”
 22 Stansbury, 511 U.S. at 322 (internal quotations omitted). The court must ask “how a reasonable
 23 man in the suspect’s position would have understood his situation.” Stansbury, 511 U.S. at 324.
 24 Some factors courts use in helping decide whether a reasonable person would believe that he or
 25 she was not free to leave are: “(1) the language used to summon the individual; (2) the extent to
 26 which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the
 27 interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain
 28 the individual.” United States v. Kim, 292 F.3d 969, 974 (9th Cir. 2002). When determining

1 whether a suspect is being interrogated, under standards outlined by the Supreme Court,
2 interrogation includes express questioning as well as “its functional equivalent.” Mauro, 481
3 U.S. at 526. The Supreme Court has stated that “its functional equivalent” means “any words or
4 actions on the part of the police (other than those normally attendant to arrest and custody) that
5 the police should know are reasonably likely to elicit an incriminating response from the
6 suspect.” Mauro, 481 U.S. at 526-27.

7 In the present matter, both parties have stipulated that Miranda warnings were not given
8 to Akpan before he was interviewed by the agents. In order to determine whether Akpan’s Fifth
9 Amendment Rights were violated the Court must look at each interview separately.

10 **A. First Interview**

11 Prior to Akpan being interviewed, the agents informed him that he was not under arrest
12 and that the interview was voluntary. Akpan claims that he asked to speak with his lawyer but
13 was denied. “If a suspect indicates in any manner that he wishes to consult with an attorney
14 before speaking, there can be no questioning.” Norman v. Ducharme, 871 F.2d 1483, 1486 (9th
15 Cir. 1989). “A request for counsel need not be stated as a model of eloquence and clarity in
16 order to qualify as an unequivocal invocation of the right to counsel.” Alvarez v. Gomez, 185
17 F.3d 995, 997 (9th Cir. 1999).” Based on the testimony presented at the evidentiary hearing, the
18 Court finds that Akpan did not ask to speak with his attorney but asked, “Should I talk to my
19 lawyer?” The statement, “Should I talk to my lawyer?” is not a sufficient unequivocal request for
20 counsel; therefore, Akpan did not invoke his Fifth Amendment right to counsel. Ducharme, 871
21 F.2d at 1486; see also United States v. De La Jara, 973 F.2d 746, 750 (9th Cir. 1992) (explaining
22 “Should I call my lawyer?” does not constitute an invocation).

23 The Court finds that under the factors outlined in Kim, Akpan was not in custody during
24 the first interview. 292 F.3d at 974. The language used by the agents to solicit the interview was
25 respectful and cordial. During the first interview, Akpan was not confronted with evidence of
26 guilt. The interview was conducted in Akpan’s living room with one agent sitting across and one
27 agent sitting on another side in a separate chair from Akpan. The duration of the first interview
28 was approximately two and one-half hours. Lastly, there was no pressure applied to detain

1 Akpan. Based on the totality of the circumstances, the Court finds that Akpan was not in custody
2 during the first interview and was free to leave at any time.

3 The Court finds that Akpan was not subjected to a custodial interrogation during the first
4 interview. The agents did not ask Akpan questions that were likely to elicit an incriminating
5 response. Akpan was asked questions regarding his background, experience, finances, other
6 business ventures, and about general business operations. At no time during the first interview
7 was he asked about specific or individual fraudulent incidents.

8 Based on the foregoing, the Court finds that Akpan was not subjected to a custodial
9 interrogation during the first interview; therefore, Miranda warnings were not needed to be given
10 and Akpan's Fifth Amendment rights were not violated.

11 **B. Second Interview**

12 Akpan's argues that his Fifth Amendment rights against self incrimination were violated
13 during the second interview. Akpan was not given any Miranda warnings prior to the second
14 interview. Similar to the first interview, he was informed that the interview was voluntary;
15 however, the scope of the questioning exceeded that customary to a normal interview. The
16 Supreme Court has stated that if "any words or actions . . . that the police should know are
17 reasonably likely to elicit an incriminating response from the suspect," are used, the questioning
18 becomes an interrogation. Mauro, 481 U.S. at 526. Here, Akpan was not given any Miranda
19 warnings and Miranda warnings should have been given before the second interview began
20 because the agents knew that they were going to ask Akpan questions about specific fraudulent
21 incidents. A reasonable person in Akpan's position would perceive the second interview as an
22 interrogation.

23 The Court finds that the Government asked Akpan questions that were "reasonably
24 likely to elicit an incriminating response" without first giving Akpan his Miranda warnings.
25 Mauro, 481 U.S. at 526-27. However, unlike Mauro, Akpan was still not in custody or its
26 equivalent during the second interview. Akpan's statements made during the second interview
27 will be not suppressed. A 2008 Ninth Circuit case was brought to the court's attention after the
28 evidentiary hearing. United States v. Craighead, 539 F.3d 1073 (9th Cir. 2008). After thorough

1 review and analysis, no change in the courts' findings and conclusions is required by the
2 Craighead case.

3 **IV. Motion to Return Property**

4 During the suppression hearing, Akpan raised the issue that the Government is in
5 possession of property that should be returned to him. The Court will not rule on this issue
6 because Akpan did not file a Motion under Federal Rules of Criminal Procedure 41(g).

7 **CONCLUSION**

8 The Court finds that: (1) the search warrant, affidavit, and attachments were sufficiently
9 particular and constitutional and did not amount to a general unconstitutional search warrant; (2) the
10 searches conducted on Akpan's businesses, storage units, and residence were executed in a
11 reasonable manner; (3) Akpan was not subjected to a custodial interrogation during the two
12 interviews; and (4) Akpan must file a Motion to Return Property pursuant to Federal Rules of
13 Criminal Procedure 41(g) before the Court will rule on the issue raised at the suppression hearing.

14 **RECOMMENDATION**

15 Based on the foregoing and good cause appearing therefore,

16 IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that the
17 Defendant's Motion to Suppress (#68) be **DENIED**.

18 **NOTICE**

19 Pursuant to Local Rule IB 3-2 any objection to this Report and Recommendation must
20 be in writing and filed with the Clerk of the Court on or before September 30, 2008 The

21 Supreme Court has held that the courts of appeal may determine that an appeal has been waived due
22 to the failure to file objections within the specified time. Thomas v. Arn, 474 U.S. 140, 142 (1985).

23 This circuit has also held that (1) failure to file objections within the specified time and (2) failure
24 to properly address and brief the objectionable issues waives the right to appeal the District Court's
25 order and/or appeal factual issues from the order of the District Court. Martinez v. Ylst, 951 F.2d


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1 1153, 1157 (9th Cir. 1991); Britt v. Simi Valley United Sch. Dist., 708 F.2d 452, 454 (9th Cir.
2 1983).

3 DATED this 26th day of September, 2008.

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8 ROBERT J. JOHNSTON
United States Magistrate Judge
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